

1 **ERIC BJORGUM (State Bar No. 198392)**

2 Eric.bjorgum@kb-ip.com

3 KARISH & BJORGUM PC

4 119 E. Union Street, Suite B

5 Pasadena, CA 91103

6 Telephone: (213) 785-8070

7 Facsimile: (213) 955-5010

8 Attorneys for Plaintiff PCR Distributing, Co.

9
10 UNITED STATES DISTRICT COURT

11
12 CENTRAL DISTRICT OF CALIFORNIA

13
14 PCR DISTRIBUTING CO.,

15 vs.

16 Plaintiffs,

17 vs.

18 JOHN DOES 1 – 10, d/b/a
19 NHENTAI.NET,

20 Defendants.

21 Case No. 24-cv-07453-FLA-AJR

22 **PLAINTIFF'S OPPOSITION TO
23 DEFENDANTS' MOTION TO
24 DISMISS AND STRIKE**

25 Date: February 7, 2025

26 Time: 1:30 p.m.

27 Judge: Hon. Fernando L. Aenlle-
28 Rocha

Courtroom: 6B

Place: Roybal Federal Building and
U. S. Courthouse
255 E. Temple Street
Los Angeles, California 90012

MEMORANDUM OF POINTS AND AUTHORITIES

2 Plaintiff PCR Distributing Co. (“PCR”) hereby files the following Opposition
3 to Defendant NHentai.net’s (“Nhentai”) Motion to Dismiss and Strike the
4 Complaint (“Motion”). Dkt. No. 31. Plaintiff will also file a timely amended
5 complaint under Fed.R.Civ.P. 15(a). This Opposition is presented only to meet the
6 requirements of the Local Rules, which requires that for each motion, either an
7 Opposition or Notice of Non-Opposition be timely filed. Plaintiff’s Opposition to
8 the pending motion is due before the amended complaint, so it is being submitted in
9 an abundance of caution so that the Court does not conclude that Plaintiff concedes
10 to the Motion. During the meeting confer process, Plaintiff’s counsel reminded
11 Defendant’s counsel that the Federal and Local Rules disfavor motions to dismiss
12 when an amended pleading may be more prudent, but Defendant’s counsel filed this
13 motion anyway.

14 | I. INTRODUCTION

15 NHentai's Motion is an ill-conceived attempt to litigate numerous disputed
16 issues of fact through an attack on the face of the pleadings. The Motion should be
17 denied in its entirety.

18 First, as noted above, Plaintiff intends to file an amended complaint within
19 the deadlines of Fed.R.Civ.P. 15(a) but files this Opposition so as not to run afoul of
20 L.R. 7-12, which states that “[f]ailure to file any required document. . . may be
21 deemed consent to the granting or denial of the motion.” Courts have raised
22 concerns as to whether similar rules are consistent with Rule 12(b)(6). *E.g., Cohen*
23 *v. Board of Trustees of the University of the Dist. of Columbia*, 819 F.3d 476, 481
24 (D.C. Cir. 2016) (local rule allows a district court to grant a motion to dismiss
25 because it is unopposed rule places the burden of persuasion on the nonmoving
26 party in contradiction to Rule 12(b)(6)). Circuits are split on the issue. *See, e.g.,*
27 *Cohen v. Board of Trustees of the University of the Dist. of Columbia*, 819 F.3d 476,

1 481–482 (D.C. Cir. 2016), (the majority of circuits “prohibit district courts from
2 granting a motion to dismiss solely because the plaintiff failed to respond”);
3 *Pomerleau v. W. Springfield Pub. Sch.*, 362 F.3d 143, 145 (1st Cir. 2004) (local rule
4 may permit dismissal based on non-opposition if “the result does not clearly offend
5 equity”). Plaintiff maintains that its complaint is adequately plead, but responds
6 briefly below to Defendant’s arguments.

7

8 **II. ARGUMENT**

9 **A. Plaintiff Is Not Required To Specifically Every Fact Supporting**
10 **Infringement Allegations**

11 Defendant’s Motion attempts to hold Plaintiff to a higher standard of pleading
12 than required under the Federal Rules. As noted by Professor Nimmer:

13 Courts will sustain a complaint under *Twombly* even when it admits on
14 its face that “it is not known without further discovery” whether
15 defendant even infringed at all. So long as the allegations of the
16 complaint as a whole “raise a reasonable expectation that discovery
17 will reveal evidence of the necessary elements for copyright
18 infringement,” plaintiff may continue to prosecute the case.

19 3 Nimmer on Copyright § 12.09 (2024).

20 **B. Plaintiff Has Adequately Plead Ownership.**

21 Defendant argues that Plaintiff has not shown itself to the owner of the
22 Copyrights, stating that ownership is only mentioned in Paragraph 6 of the
23 Complaint. This is incorrect.

24 The following are some of the multiple allegations of ownership in the
25 Complaint:

26 “2. Plaintiff’s content identified in this case is registered with the U.S.
27 Copyright Office (the “Works”).”

1 “27. A schedule of the copyright registrations for Plaintiff’s works at issue is
2 attached as **Exhibit B** (the “Subject Works”).”

3 “59. Plaintiff owns copyrights in the Subject Works.”

4 “60. Plaintiff has valid registrations with the United States Copyright Office
5 for each of the Subject Works.”

6 “74. Unknown individuals, without authorization, reproduced and distributed
7 Plaintiff’s works through Defendants’ websites, directly infringing Plaintiff’s
8 Subject Works.”

9

10 **C. An Assignment Need Not Be Plead.**

11 There is no requirement to plead an assignment of copyright. Under the
12 Copyright Act of 1976 as initially enacted, the obligation to record a transfer applied
13 to any case in which the plaintiff was someone other than the author. In such
14 circumstances, the plaintiff must first record in the Copyright Office "the instrument
15 of transfer" under which the plaintiff asserts ownership of the rights allegedly
16 infringed. However, after the enactment of the Berne Convention, as to
17 infringements occurring after March 1, 1989, this requirement no longer applied. .
18 *Peer Int'l Corp. v. Latin Am. Music Corp.*, 161 F. Supp. 2d 38, 49 (D.P.R. 2001)

19

20 **D. Copies of the Infringed Work Are Not Required to Be Attached to the
21 Complaint.**

22 “In a statutory infringement action, it is no longer necessary that either a copy
23 of the work allegedly infringed, or a copy of the allegedly infringing work,
24 accompany the complaint.” 3 Nimmer on Copyright § 12.09 (2024).

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1 **E. The Facts Underlying Registration Need Not Be Plead In The**
2 **Complaint.**

3 Because of the presumption of validity raised by a registration, the Defendant
4 -- not the Plaintiff -- has the burden of proving noncompliance with the registration-
5 deposit requirement. Nor must Plaintiff prove that the copy of the work that
6 accompanies the complaint is identical to the copy or copies theretofore deposited
7 with the Copyright Office, unless the defendant raises this issue later in the matter.

8 3 Nimmer on Copyright § 12.09 (2024)

9 Under both the Copyright Act of 1909 and the Copyright Act of 1976,
10 registration by the Copyright Office is *prima facie* evidence of copyrightability.
11 1909 Act, § 55, 35 Stat. 1075, 1086 (1909) (repealed 1976); 1976 Act, § 410(c), 90
12 Stat. 2541, 2583 (1976) (codified at 17 U.S.C. § 410(c)). This presumption shifts the
13 burden of proof to the challenging party to demonstrate why the item in question is
14 not copyrightable. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 157 (1976), *reprinted*
15 in 1976 U.S. Code Cong. & Ad. News 5659, 5773. The defendants failed to meet
16 their burden. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1019
17 (9th Cir. 1985). These arguments apply at the summary judgment stage, if at all.
18 *Malibu Textiles, Inc. v. Label Lane Int'l, Inc.*, 922 F.3d 946, 952 (9th Cir. 2019) (“at
19 the pleading stage, Malibu successfully alleged ownership of valid,
20 registered copyrights”). Actionable copying requires pleading of facts plausibly
21 showing either (1) “that the two works in question are strikingly similar,” or (2)
22 “that [the works] are substantially similar and that [Defendants] had access to the
23 [Subject Work].” *Id.*

24 Dismissal at the pleading stage requires that it must be the case that
25 “[n]othing disclosed during discovery could alter the fact that the allegedly
26 infringing works are as a matter of law not substantially similar to” the
27 original copyrighted work. *Gregorini v. Apple Inc.*, 2022 U.S. App. LEXIS 4640, at
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1 *3-4 (9th Cir. Feb. 22, 2022) (citing *Rentmeester*, 883 F.3d at 1123.)

2

3 **F. Prelawsuit Negotiations Are Not a License.**

4 Defendant claims that negotiations that broke down equate to “permission.”

5 If this were the case, parties would be encouraged to litigate rather than talk.

6 Further, there is no consideration supporting a license. Defendant never gave

7 Plaintiff anything. *Interscope Records, Motown Record Co., L.P. v. Time Warner, Inc.*, No. CV 10-1662 SVW (PJWx), 2010 U.S. Dist. LEXIS 151460, at *25 (C.D.

8 Cal. June 28, 2010 (license possible where “undisputed facts demonstrated that from

9 the inception of the License Agreement, Doculex paid royalty payments to

10 ExperExchange for the use of RTK software in numerous products; that

11 ExperExchange accepted such payments and never notified Doculex that its use of

12 the software in those products exceeded the License Agreement; that

13 ExperExchange renewed the License Agreement for years; and that ExperExchange

14 encouraged Doculex to use its software in as many products as possible and knew

15 that they were in fact doing so.”)

16

17 **G. The Statute of Limitations Does Not Bar This Suit**

18 Defendant claims that the statute of limitations bar this suit because there was

19 some contact between the parties regarding potential banner ads in 2020, and they

20 subsequently had negotiations that broke down. However, these communications

21 are not part of the Complaint, and it is unclear from the Complaint or the Motion

22 which works in the 92 pages of infringing links this applies too.

23

24 Moreover, the letters from Plaintiff are not authenticated. It would be unfair

25 for Plaintiff to have its entire case time barred forever because of some preliminary

26 discussions regarding licensing.

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1 **III. CONCLUSION**

2 For the foregoing reasons, this Court should deny Defendant's Motion in its
3 entirety and permit the litigation to go forward.

4

5 Dated: January 17, 2025

Respectfully submitted,

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7 By: /s/ Eric Bjorgum
8 A. Eric Bjorgum
9 KARISH & BJORGUM PC
10 Attorneys for Plaintiff
11 PCR Distributing Co.

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CERTIFICATE OF WORD COUNT

2 The undersigned, counsel of record for Plaintiff, PCR Distributing Co,
3 certifies that this brief contains 1,390 words, according to the word count feature of
4 the computer program used to prepare this brief, which complies with the word limit
5 of L.R. 11-6.1.

By: /s/ Eric Bjorgum
A. Eric Bjorgum
KARISH & BJORGUM PC
Attorneys for Plaintiff
PCR Distributing Co.

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2025, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

6 John T. Wilson
7 Jennifer M. Rynell
8 eservice@wwrlegal.com
9 WILSON WHITAKER RYNELL
10 Wilson Legal Group P.C.
11 16610 Dallas Parkway, Suite 1000
12 Dallas, Texas 75248

11 Glenn T. Litwak
12 glenn@glennglitwak.com
13 LAW OFFICES OF GLENN T. LITWAK
14 201 Santa Monica Boulevard, Suite 300
Santa Monica, California 90401

By: /s/ Eric Bjorgum
A. Eric Bjorgum